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Constitutional Aspects of the Abolition of Federal "Common Law"

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Comments

CONSTITUTIONAL ASPECTS OF THE ABOLITION OF FEDERAL "COMMON LAW"

One of the justices of the Supreme Court of the United States is said to have remarked recently that laymen are apt to overlook a late unspectacular decision whose consequences far outweigh those of any of the much discussed New Deal cases. The justice had reference to *Erie Railroad Co. v. Tompkins*[1] which, in overruling the celebrated case of *Swift v. Tyson*,[2] upset the settled jurisprudence of nearly a century on the subject of federal common law. Although unnoticed by the general public, the *Erie* case has not escaped the serious attention of the members of the legal profession.[3]

It will be recalled that in *Swift v. Tyson*,[4] Chief Justice Story laid down the rule that in matters of general jurisprudence the federal courts need not follow the case law of the states when

1. 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 787, 114 A.L.R. 1487 (1938). In this case Tompkins, a citizen of Pennsylvania, while walking along a footpath which ran parallel to the Erie Railroad's right-of-way near Hughestown, Pennsylvania, was injured by a swinging door on a passing freight car. Suit was brought in the federal court for the Southern District of New York. The railroad claimed that its liability should be determined by the decisions of the courts of the state of Pennsylvania and that under these decisions the plaintiff would be denied recovery. Tompkins, on the contrary, relying on the doctrine of Swift v. Tyson, 41 U.S. 1, 10 L.Ed. 865 (1842), contended that tort liability was a matter of 'general law' and that hence the decisions of the courts of Pennsylvania were not controlling. There was verdict and judgment for the plaintiff. The Circuit Court of Appeals for the Second Circuit affirmed the judgment [90 F. (2d.) 603 (1937)] on the authority of *Swift v. Tyson*. On certiorari, the Supreme Court held that *Swift v. Tyson* was an unconstitutional usurpation of judicial power by the Courts of the United States in contravention of the Tenth Amendment to the Constitution. It therefore reversed the judgment of the Circuit Court of Appeals and remanded the case. The majority opinion was written by Mr. Justice Brandeis. Mr. Justice Butler wrote a dissenting opinion in which Mr. Justice McReynolds joined. Mr. Justice Reed concurred with the majority in part only, while Mr. Justice Cardozo took no part in the consideration or decision of the case.

2. 41 U. S. 1, 10 L.Ed. 865 (1842).

3. The case was the subject of an address by Solicitor General Jackson before the American Bar Association at its meeting in Cleveland July 25-30. Jackson, The Rise and Fall of Swift v. Tyson (1938) 24 A.B.A.J. 609.

4. The question involved in this celebrated case was whether or not a bona fide holder of a promissory note given in consideration of a pre-existing debt took free and clear of equities between the original parties. Suit was brought in the Circuit Court of the United States for the Southern District of New York. The Supreme Court assumed that the decision of the state of New York decided that a pre-existing debt did not so protect the bona fide

exercising jurisdiction on the ground of diversity of citizenship.[5] Section 34 of the Judiciary Act of 1789[6] had directed the federal courts to apply state law in diversity matters. In the *Swift* case the court interpreted "law" to mean "local law," that is, state constitutions, state statutes, and decisions interpreting them; and decisions on local usages with respect to immovable property. Decisions on commercial matters and questions of general jurisprudence were held to be outside the operation of the statute.

In the course of time there developed a very substantial body of federal law, differing from that of the states, on subjects over which the states, and not the Federal Government, have general jurisdiction. There grew up, for example, federal rules of commercial law, federal rules of tort law, federal rules respecting validity of the subject matter of contract, and the like. The effect of this situation was to give non-residents a choice of law as well as a choice of courts when the subject matter of the suit was one of general jurisprudence.[7] Whether or not this discrimination as to rules of law was intended by Congress has long been the subject of learned controversy.[8] It is agreed by all that federal jurisdic-

holder. Yet it held through Mr. Justice Story that the New York decisions were not controlling on the federal courts and that the New York rule should not be followed. 41 U.S. 1, 14-24, 10 L.Ed. 865 (1842).

5. U. S. Const. Art. III, § 2, cl. 1.

6. "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 1 Stat. 92 (1789) 28 U.S.C. § 725 (1938).

7. This is illustrated in the well-known decision of Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928). There a Kentucky taxicab corporation made a contract with a railroad corporation for the exclusive privilege of going on the railroad's premises to conduct the taxicab business. By a series of decisions of the Supreme Court of Kentucky this contract was clearly illegal. The Kentucky taxicab corporation was dissolved, was reincorporated in Tennessee under the same name, and concluded an identical contract with the railroad corporation. The Supreme Court of the United States sustained this patent device to avoid the effect of state decisions by holding that the matter was one of general law and that thus the federal courts need not follow state decisions in disposing of it. See Dobie, Seven Implications of Swift v. Tyson (1930) 16 Va. L. Rev. 225, 227, 239-240. In many quarters the rule of *Swift v. Tyson* was felt to be so repugnant as to justify total abolition of the diversity jurisdiction of the federal courts. See Campbell, Is Swift vs. Tyson an Argument for or Against Abolishing Diversity of Citizenship Jurisdiction? (1932) 18 A.B.A.J. 809; Dobie, Federal Jurisdiction and Procedure (1928) 185.

8. The authorities are collected in the margin of the court's opinion in the *Erie* case. See particularly notes 3 to 7, 58 S.Ct. 819-820. Perhaps attention should be directed to the researches of Charles Warren on the intention of the framers of this section of the Judiciary Act. Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49.

tion on the ground of diversity of citizenship was intended to assure to nonresident litigants a choice of courts, that is, to permit them to be heard by a tribunal presumably disinterested in the residency of the parties. But there is fundamental disagreement on the following questions: (a) Did Congress intend to permit nonresidents to claim the benefit of substantive rules of law different from those which would be applied between residents by allowing the federal courts to develop their own rules of law? (b) If Congress did so intend does the Constitution permit such discrimination?

The three opinions written in the *Erie Railroad* case answered these two questions as follows:

1. The majority (speaking through Mr. Justice Brandeis) held that Congress did not intend to exempt state decisions from the operation of the Act. If Congress had so intended, said the Court, then the result would be unconstitutional as an invasion of states' rights. The fact that the federal courts interpreted the Act in this way was in itself an unconstitutional invasion of states' rights on the part of these courts.

2. The dissenting opinion of Mr. Justice Butler took the position that Congress intended to permit federal courts to apply their own rules of law to matters of general law; that the Constitution sanctioned this result; that one hundred years of jurisprudence unshakably attested that intention; that so vital a rule of law should not be overthrown without extended examination by the court; that the recent legislation respecting federal courts required them to notify the Attorney General when the constitutionality of a federal statute was at issue, and since this had not been done, that the case should be set down for rehearing; and, finally, that the constitutionality of the rule of *Swift v. Tyson* need not be considered since the plaintiff was guilty of contributory negligence and (presumably) could not recover even under the federal rule. Mr. Justice McReynolds joined in this dissent.

3. In an opinion concurring in part with the majority, Mr. Justice Reed agreed that *Swift v. Tyson* should be overruled on the ground that Congress had not intended its result. He disagreed, however, with the view of the majority that Congress would be unable to enact such a provision of law since he felt that the "necessary and proper" clause of Article 1, Section 8 together with the Judiciary Article of the Constitution might well authorize Congress so to legislate.

There are two aspects of this momentous case which call for discussion. One is the scope and effect of the new doctrine that federal courts must apply state decisions generally. This involves a question of what cases are overruled because dependent upon *Swift v. Tyson,* and what the effect of the new rule will be. This aspect of the decision has already been the subject of criticism and review.[9] The second aspect of the case and the one which mainly concerns us here involves its constitutional features. What will be the effect, for example, of holding *Swift v. Tyson* unconstitutional, and whether the issue of constitutionality was actually necessary to the decision of the *Erie* case.

Effect of the New Rule

It is not the purpose of this comment to raise the question whether *Swift v. Tyson* should have been overruled. The literature on that subject is immense.[10] The case has had able supporters and learned antagonists. Presumably, these writers will maintain their former attitude in considering the *Erie* case. The only change is in the relative position of friend or foe. Hence, anyone interested in the desirability of the rule of the *Erie* case may still consult that body of doctrine.

The question of the *effect* of the new rule, however, is of immediate practical importance. The majority opinion states categorically: "There is no federal general common law."[11] Section 34 is held to include state decisions as well as state statutes. It is fair to assume, therefore, that every decision of the federal courts is suspect in which a rule different from that laid down by the decisional law of the state courts has been followed. An examination of some of the instances in which the old rule has been applied by the federal courts should therefore serve to illustrate the important changes likely to be effected by the new rule.

The following is a brief enumeration of important matters in which federal courts have ignored relevant decisions of state courts and have applied their own rules of law.[12]

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9. For a discussion of this phase of the decision see McCormick and Hewins, The Collapse of "General Law" in the Federal Courts (1938) 33 Ill. L. Rev. 126; Shulman, The Demise of Swift v. Tyson (1938) 47 Yale L. J. 1336; Schmidt, Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins (1938) 16 Texas L. Rev. 512; Jackson, The Rise and Fall of Swift v. Tyson (1938) 24 A.B.A.J. 609.

10. Supra note 8.

11. 58 S.Ct. at 822.

12. See margin of the court's opinion in the *Erie* case, 58 S.Ct. at 821, n. 11-18.

1. *Commercial paper.* This was the direct result of the holding in *Swift v. Tyson,* which involved a question of past consideration in negotiable instruments.[13] After the widespread adoption of the Negotiable Instruments Law it was expected that the federal courts would follow state decisions on the act. However, this was not always done, and the matter seems not to have been put at rest until the Supreme Court finally held in the *Burns Mortgage Company* case[14] that state court interpretations of the Negotiable Instruments Law were binding on federal courts. The rights of holders of bonds of municipalities, however, are matters of general jurisprudence.[15]

2. *Contracts.* The interpretation of contracts has usually been held to be a matter of general law.[16] So also is the validity of a release,[17] or of an arbitration agreement.[18] The effect of a contract of one *non compos mentis* has been held to be subject to general rather than local law.[19]

3. *Torts.* The ordinary rules of negligence,[20] for example, and the effect of contributory negligence[21] are usually regarded as

13. Swift v. Tyson was followed in Miller v. Austen, 54 U.S. 218, 14 L.Ed. 119 (1851); Oakes v. Montgomery First Nat'l Bank, 100 U.S. 239, 25 L.Ed. 580 (1879); Brooklyn City R. Co. v. National Bank of Republic, 102 U. S. 14, 26 L.Ed. 61 (1880); Jewett v. Hone, 13 Fed. Cas. No. 7311 (1873); Farmers' National Bank v. Sutton Mfg. Co., 52 Fed. 191 (C.C.A. 6th, 1892); Phipps v. Harding, 70 Fed. 468 (C.C.A. 7th, 1895); Northern Nat. Bank v. Hoopes, 98 Fed. 935 (C.C.E.D.N.Y. 1900); Citizens' Savings Bank v. Newburyport, 169 Fed. 766 (C.C.A. 1st, 1909); Forrest v. Safety Banking and Trust Co., 174 Fed. 345 (C.C. E.D. Pa. 1909); Rochester Security Trust Co. v. Des Moines County, 198 Fed. 331 (C.C.S.D. Iowa 1909); Shenandoah National Bank v. Liewer, 187 Fed. 16 (C.C.A. 8th, 1911); Young v. Lowry, 192 Fed. 825 (C.C.A. 3d, 1912); North Philadelphia Trust Co. v. Smith, 13 F. (2d) 585 (C.C.A. 8th, 1926); Sears v. Greater New York Development Co., 51 F. (2d) 46 (C.C.A. 1st, 1931); The Sagittarius, 57 F. (2d) 756 (D.C. Mass. 1932).

14. Burns Mortgage Co. v. Fried, 292 U.S. 487, 54 S.Ct. 813, 78 L.Ed. 1380 (1934). For a criticism of this decision see Beutel, Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions (1934) 9 Tulane L. Rev. 64.

15. Cf. Wade v. Travis County, 174 U.S. 499, 19 S.Ct. 715, 43 L.Ed. 1060 (1899); Board of Education v. James, 49 F. (2d) 91 (C.C.A. 10th, 1931).

16. Delmas v. Merchants' Mutual Insurance Co., 81 U.S. 661, 20 L.Ed. 757 (1872); Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681 (1928); Phelps v. Board of Education, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937).

17. Haskell v. McClintic-Marshall Co., 289 Fed. 405 (C.C.A. 9th, 1923).

18. United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (D.C.S.D. N.Y. 1915); Rae v. Luzerne County, 58 F. (2d) 829 (D.C.M.D. Pa. 1932).

19. Edwards v. Davenport, 20 Fed. 756 (C.C.S.D. Iowa 1883).

20. Railroad Co. v. Gladmon, 82 U.S. 401, 21 L.Ed. 114 (1872); Railroad Co. v. Stout, 84 U.S. 657, 21 L.Ed. 745 (1873); Union Pacific Ry. Co. v. McDonald, 152 U.S. 262, 14 S.Ct. 619, 38 L.Ed. 434 (1894); Commercial Electric Supply Co. v. Gresdmer, 59 F. (2d) 512 (C.C.A. 6th, 1932).

21. Hemingway v. I.C.R. Co., 114 Fed. 843 (C.C.A. 5th, 1902); Central Ver-

matters of general jurisprudence. So also are liability for negligence of employees,[22] the extent of the liability of railroads and telegraph companies for negligence,[23] and the effect of agreements to limit such liability.[24]

4. *Immovable Property.* Even in cases involving immovable property the federal courts have sometimes refused to follow the decisions of the courts of the state wherein the object is located,[25] particularly if the state decisions were rendered after rights had accrued.[26]

5. *Measure of damages.* The general principle is that the federal courts apply their own rules for the measure of damages.[27]

6. *Evidence.* The parole evidence rule is a matter of general, not local, law.[28]

7. *Conflict of laws.* It has been generally held that the federal courts will determine for themselves rules of the conflict of laws.[29] What effect the *Erie* case will have upon that doctrine is largely a matter of conjecture.

This brief survey of the matters heretofore falling outside of Section 34 of the Judiciary Act serve to illustrate the vast scope of the *Erie* case. Doubtless a cloud of litigation will ensue to determine the extent of the decision, and its applicability wherever the rule of *Swift v. Tyson* has been enforced.[30] We can do no more than speculate on the outcome of the new rule. Certainly it is bound to have serious effect on those engagements entered into and those commitments already made in reliance on a century of jurisprudence stemming from *Swift v. Tyson.*

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mont R. Co. v. White, 238 U. S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915); Butler v. Mo. Pac. Ry. Co., 2 F. Supp. 226 (D.C.W.D. La. 1932).

22. Coyne v. Union Pac. Ry. Co., 133 U.S. 370, 10 S.Ct. 382, 33 L.Ed. 651 (1890); Baltimore and Ohio R. Co. v. Baugh, 149 U.S. 368, 13 S.Ct. 914, 37 L.Ed. 772 (1893).

23. Supra note 20.

24. New York Central Railroad Co. v. Lockwood, 84 U.S. 357, 21 L.Ed. 627 (1873).

25. Erie Railroad v. Tompkins, 58 S.Ct. at 821 n. 15-18.

26. See Kuhn v. Fairmont Coal Co., 215 U.S. 349, 360, 30 S.Ct. 140, 54 L.Ed. 228 (1910).

27. Lake Shore and M.S.R. Co. v. Prentice, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97 (1893).

28. Sioux Falls Nat. Bk. v. Klaveness, 264 Fed. 40 (C.C.A. 8th, 1920).

29. Dygert v. Vermont Loan Co., 94 Fed. 913 (C.C.A. 9th, 1899).

30. For example, the court has already determined that the new rule applies as well in equity as at law. Ruhlin v. New York Life Ins. Co., 58 S.Ct. 860, 82 L.Ed. 823 (1938). This decision was to be expected since it has long been settled that § 34 covers equity cases in spite of the apparent limitation of the words of the statute to "trials at common law." Mason v. United States, 260 U. S. 545, 43 S.Ct. 200, 67 L.Ed. 396 (1923).

CONSTITUTIONAL ASPECTS

As has been indicated above, the *Erie* case has certain very interesting constitutional aspects. In the first place, the majority accepts the pronouncement of Mr. Justice Holmes that the rule of *Swift v. Tyson* is "an unconstitutional assumption of powers of the courts of the United States."[31] The theory upon which this doctrine rests is that in certain instances courts are acting unconstitutionally when they interpret a federal statute so broadly as to bring within the range of federal judicial power matters not confided to that government by the Constitution. " . . . This Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states," says Mr. Justice Brandeis.[32] The doctrine that a court is acting unconstitutionally when it misinterprets a statute has an element of refreshing newness about it.

It is true that in this decision the doctrine is confined to situations in which the power of the federal judiciary is enhanced at the expense of what are deemed to be the rights of the states. However, if the federal courts are acting unconstitutionally when they misinterpret the Tenth Amendment, what about their misinterpretation of other provisions of the Constitution? Was the Supreme Court acting unconstitutionally when it decided the case of *Long v. Rockwood*[33] which held that the state is without power to tax patent royalties? This decision was expressly overruled in *Fox Film Corporation v. Doyal*.[34] Did the Supreme Court "invade" the reserved power of the state to tax in the *Long* case? Or must we say that this is a mere restriction of the rights of the state without a corresponding usurpation of power by the federal court?

Justice Brandeis attempts to distinguish between an unconstitutional course of conduct on the part of the courts and a mere series of erroneous decisions. He clearly intimates that if the only proposition before the court was that Section 34 of the Judiciary Act had been misinterpreted, then the court would not be justified in overturning a huge body of decided law to correct the error.[35]

31. Dissenting opinion in Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U. S. 518, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928) quoted in the opinion of the Court in the *Erie* case, 58 S. Ct. at 823 (1938).

32. Ibid.

33. 277 U.S. 142, 48 S.Ct. 463, 72 L.Ed. 824 (1928).

34. 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (1932).

35. "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century." 58 S.Ct. at 822 (1938).

Congress could have done that with complete propriety at any time but did not do so. The principle that an interpretation of a statute long acquiesced in and widely followed may not lightly be disturbed would have persuaded the court not to act. However, where the issue is usurpation of authority by the courts, then in the words of Justice Holmes there has been "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[36]

The distinction the court drew here is a fine one. In fact Mr. Justice Reed refused to accept it, preferring to regard the decision of *Swift v. Tyson* as error rather than usurpation.[37] Let us see whether we can discern wherein the distinction lies. To begin with, it will be admitted broadly that federal courts are bound by the Constitution as well as the other branches of the government. Hence, if a federal court were to deny to a defendant in a criminal case the right to confront the witnesses against him, the action would be clearly unconstitutional.

Or, to take another example, in *Hayburn's* case,[38] certain federal circuit courts refused to administer the Revolutionary pension rolls on the ground that this would be a usurpation of executive power by courts and hence would violate the principle of separation of governmental powers. Suppose the circuit courts had decided otherwise and the Supreme Court first sustained this action and later repudiated it? Could it be said that in the interim between decisions of the Supreme Court the circuit courts had been acting unconstitutionally?

In *Adkins v. Children's Hospital*[39] the Supreme Court effectively prevented Congress from prescribing the basis of minimum wages of working women in the District of Columbia. This case was subsequently overruled.[40] Can it be said that the first decision was unconstitutional since in it the court misinterpreted the due process clause of the Fifth Amendment?

We should be inclined, I believe, to regard *Long v. Rockwood* and *Adkins v. Children's Hospital* as erroneous decisions; and the

36. Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 516, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928).

37. "It seems preferable to overturn an established construction of an act of Congress, rather than, in the circumstances of this case, to interpret the Constitution." 58 S.Ct. at 828 (1938).

38. 2 U.S. 408, 1 L.Ed. 436 (1792).

39. 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923).

40. In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

confrontation case and the pension roll case as instances of unconstitutional action by the courts. The distinction, then, is this: *To define constitutional power incorrectly is error. To exercise power thus wrongfully defined is unconstitutional action.* Ordinarily, these two functions are separate. Courts are usually called upon to define the limits of the powers of other agencies. When, however, courts have occasion to define the limits of their own power, then such interpretation ordinarily results in the wrongful exercise of power. In the *Long* case,[41] the court wrongfully defined the taxing power of the state, and in the first minimum wage case[42] it incorrectly imposed a limitation upon the power of Congress. In neither instance was judicial power increased or diminished. On the other hand, in the supposed confrontation case and the pension roll case, judicial power would be increased if the court made an erroneous decision. In the first, the court would have permitted itself to dispense with the constitutional requirement for confrontation, while in the second case it would have usurped an executive function in administering pension rolls.

Applying this analysis to the *Erie* case, we may now say that in *Swift v. Tyson* the court was in error when it construed Section 34 as not applicable to state decisions on matters of general jurisdiction. Then, when it imposed its own rule in the decision of a matter of this sort, it acted unconstitutionally.

The second interesting constitutional aspect of the *Erie* case is its dictum that Congress is without power to enact a statute directing the federal courts to disregard state decisions and to apply their own rules of law in diversity cases. This proposition is necessarily inherent in the decision of the court even though it expressly declared that in disapproving the doctrine of *Swift v. Tyson* it did "not hold unconstitutional section 34 of the Judiciary Act or any other Act of Congress."[43] In an earlier part of the opinion the court says "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[44] Now, if Congress may not direct federal courts to ignore state decisions, it likewise may not direct them to ignore state statutes, or any other type of state law. Hence, the federal

41. Long v. Rockwood, 277 U.S. 142, 48 S.Ct. 463, 72 L.Ed. 824 (1928).
42. Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923).
43. 58 S.Ct. at 823 (1938).
44. 58 S.Ct. at 822 (1938).

courts would have to apply state law no matter what Congress did. In a word, according to the majority view the enactment of Section 34 of the Judiciary Act, on the books since 1789, was a work of supererogation. It need not be added, of course, that the Court did not draw this invidious conclusion. Yet the writer is unable to see how such an inference can be escaped.

Moreover, if as the majority says, the federal courts have no power to declare substantive rules of common law applicable in a state, how are the federal courts to decide cases when no applicable state court decision exists? Would not this equally be an invasion of state rights? Again, if a federal court ventures to lay down a rule of common law in the absence of state decisions what happens to such a rule when the state courts finally speak? And would the voice of an inferior state court suffice to still that of the relevant federal court? Or must the state court of last resort be heard? These and similar questions await determination by the federal courts. How they will be answered is pure matter of conjecture, although analogies will doubtless be furnished by decisions where state statutes and questions of local interest have been involved.[45] However, it must not be forgotten that when the federal courts dealt with these gaps in the past, they were not faced with the pronouncement of the Supreme Court that the application of other than state law by federal courts in these matters is an unconstitutional usurpation of power.

Mr. Justice Reed dissented from the intimation in the majority opinion that Congress does not have constitutional power to authorize federal courts to depart from state decisional rules. He points out that Congress may unquestionably regulate procedure in federal courts, and that procedure and substance merge indiscriminately. He seems to conclude from these premises that Congress would therefore have the power to legislate concerning rules of decision in cases admittedly within the jurisdiction of federal courts. The "necessary and proper" clause of Article I, section 8 is invoked to bolster this rather doubtful line of reasoning.

In partial answer to this argument it might be said that although the line between procedure and substantive law is hard to draw, the areas themselves are quite different. If lawyers were unable to grasp the distinction between the rules of law to be applied, and the way of applying them, there would indeed be no

45. For instances of such filling of gaps see Dobie, Federal Jurisdiction and Procedure (1928) 563-565.

difference between form and substance. Yet, the fact that some rules of law are rules of procedure does not mean that all rules of law are procedural, and the constitutionality of a statute which should direct federal courts to disregard state decisions may not rest on ignoring the fundamental difference between procedure and substantive law.

Yet the writer is in essential agreement with Justice Reed since he is unable to see why Congress could not enact a "Nonconformity Statute" if it so desired.[46] Federal jurisdiction extends over diversity cases. Why may not federal rules of decision likewise govern diversity matters? Article III, section 2 of the Constitution provides:

> "The judicial power shall extend . . . to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States . . ."

The article does not prescribe rules of decision in the exercise of this jurisdiction. State law need not be applied to cases affecting Ambassadors (we presume), nor to cases of admiralty or maritime jurisdiction, nor to controversies to which the United States is a party, nor to controversies between two or more states.[47] Why, then, must state law be applicable to controversies between citizens of different states?

It may be highly desirable that federal courts apply state decisions, but does the Constitution enjoin it? It might be in the interest of uniformity that the Rules of Decision Act be in force with respect to "judicial" law (a proposition highly debatable). But if Congress should enact a code of federal law for diversity matters would the result be unconstitutional? It is hard to point to any section of the Constitution which would forbid this action, and it seems clear on analogy to its other provisions that the Judiciary Article permits it. At any rate, the members of the First Congress (many of whom attended the Constitutional Convention) must have thought conformity was at least a matter of

46. "The Judiciary Article, 3, and the 'necessary and proper' clause of Article 1, § 8, may fully authorize legislation such as this section of the Judiciary Act." Per Justice Reed, 58 S.Ct. at 828 (1938).

47. "Precisely analogous reasoning has sustained the power of Congress to prescribe substantive law for admiralty cases, even those over which the commerce power does not extend." McCormick and Hewins, supra note 9, at 135.

doubt. Otherwise they would not have legislated as they did in enacting Section 34.

A third constitutional aspect of the case is the question whether the determination of unconstitutionality was gratuitous. Mr. Justice Reed thought the question need not have been raised since the only point at issue was whether the court misinterpreted Section 34 in deciding *Swift v. Tyson*. It is certain that the majority did not meet this objection squarely. Undoubtedly, Justice Reed's position would dispose of the case in the same way as did the majority, without raising the question of constitutionality. And it is a canon of constitutional construction too well known to require citation that the issue of constitutionality must not be raised in order to enable the court to pass upon matters not necessary to the decision of the case.

Finally, the dissenters raise an interesting question of the interpretation of that part of the President's Court Plan which was enacted into law. To the writer's knowledge, this is the first judicial construction of that statute. The act of August 24, 1937, provides in part as follows:

> "Whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act."[48]

The minority contended that even though the majority expressly refrained from passing upon the constitutionality of Section 34, yet it cannot be denied that the constitutionality of the Act was "drawn in question."[49] That is to say, regardless of the final out-

48. 50 Stat. 751 (1937) 28 U.S.C.A. § 401 (1938).
49. 58 S.Ct. at 827 (1938).

come of the question of constitutionality, the United States is entitled to the rights of an intervenor. It would seem to go without saying that the minority is correct on this point. The duty of the court to notify the Attorney General when the constitutionality of an act is drawn in question is plain, and the duty exists no matter what view of the statute the court may take. In a word, the court may not prejudge a question of constitutionality, even though its decision is that the statute is constitutional. It is true that in the *Erie* case the constitutionality of Section 34 was raised for the first time in the Supreme Court, yet the statute is still applicable since it specifies "any court of the United States."

Technically, the holding of the majority on the matter of constitutionality was that while Section 34 of the Judiciary Act was valid, the action of federal courts under it was unconstitutional. Can it be said that the new Court Act has no application where it is admitted that the relevant federal statute is valid, but the issue is unconstitutional enforcement or interpretation of the act? If so, then the draughtsmen of the Court Act have missed an important point. For surely, the United States government is interested in being heard whenever executive or administrative enforcement of a valid federal law is challenged as unconstitutional. Can it be said that presumably the government is not equally anxious that the Attorney General be heard when the issue is unconstitutional action by the courts? It is believed that it can not, especially where legislative or executive action is likely to be affected.

CONCLUSION

The *Erie* case is a monumental decision. Much federal law will be changed by it and many cases of an important nature may be expected as its aftermath. Reviewing the far-reaching consequences of the decision, the writer is inclined to agree with the dissenting minority that a rehearing should have been granted in order to give the Court opportunity to hear learned counsel representing all interests involved. Certainly, more mature reflection might have cleared up certain anomolous positions in the majority opinion, although it is easy to see from the temper of the court that not even the most elaborate reconsideration of the *Erie* case would have saved the much controverted rule of *Swift v. Tyson.*

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